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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

NAJIB MANSOUR ATISHA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE MIDTRIAL DISCLOSURE OF EVIDENCE WHICH THE GOVERNMENT HAD ASSURED THE DEFENDANT DID NOT EXIST JUSTIFIES THE GRANTING OF A MISTRIAL, AND WHAT STANDARDS CONFIRM THE DECISION OF SUCH A MOTION MADE BY A DEFENDANT?

II.

WHETHER THE PRESENTATION AT TRIAL OF EVIDENCE REGARDING A WHOLLY SEPARATE TRANSACTION, ABOUT WHICH THE GRAND JURY HEARD NO EVIDENCE, CONSTITUTES A VARIANCE FROM OR CONSTRUCTIVE AMENDMENT TO AN INDICTMENT'S CHARGE OF CONSPIRACY?

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OPINION BELOW

Opinion of the Sixth Circuit Court of Appeals of October 30, 1986 is appended hereto as Appendix A.

JURISDICTION

The Opinion of the Sixth Circuit court of Appeals affirming the Petitioner's conviction and sentence was entered on October 30, 1986. This Court's jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari is invoked under 28 USC §1254(1).

PROVISIONS OF LAW INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

After a somewhat convoluted investigative and procedural history, Petitioner Najib Atisha was charged by way of an Indictment (superceded several times to correct technical deficiencies) with conspiracy to steal and receive and possess goods stolen from interstate commerce, and the possession of such goods, in violation of 18 USC §371 and 659 respectively. The conspiracy count of the superceding indictment upon which Petitioner ultimately went to trial charged him along with one Dimitrius Kyriazakos, Seymour Johnson, Delos Fulwylie, Michael Covington and "Butch" whose last name was said to be unknown. Of these named defendants, only Michael Covington, Dimitrius Kyriazakos and the Petitioner went to trial.

The indictment enumerated two actual thefts of goods: a truckload of chickens, stolen on or about April 29, 1981, and a truckload of dry goods stolen on or about May 1, 1982. The indictment did not allege that Atisha was directly or personally involved in the theft of the goods; rather, he was alleged to have been the receiver or purchaser of the stolen goods (although it was alleged that a truck intended to transship the stolen chickens was rented on the account of his supermarket, Hometown Foods)

The trial of the defendants Covington, Kyriazakos and Atisha began on Tuesday, April 9, 1985, before the Honorable Horace W. Gilmore, of the Eastern District of Michigan, and a jury. Both the government and the Petitioner advised the jury by way of opening statements that the case involved two thefts — the chickens and the dry goods. However, on the second day of trial, the government advised the court that it wished to adduce additional testimony regarding a third theft, of a refrigerated truck containing hanging sides of beef, some of which were said to have been unloaded at the Petitioner's

place of business. In making his proffer of the evidence regarding the beef, the Assistant United States Attorney represented that the "first confirmation that I had that this thing actually existed and involved some of the same people was two days ago," the day before the trial began. He argued for its admission as a part of the proof of conspiracy, because it was perpetrated by some of the same persons, and "in the time frame and in the same means and methods." He specifically disavowed an intent to introduce the evidence as a "similar act" under Rule 404(b), Federal Rules of Evidence.

Petitioner initially objected to the admission of the evidence on the basis that its admission would constitute a prejudicial variance from or constructive amendment of the charges in the indictment, pointing out that as the Assistant United States Attorney admitted, the Grand Jury had never heard or passed on any evidence regarding the stolen beef, and had intended to charge only a conspiracy relating to the chickens and dry goods thefts. He also argued that, due to the prosecutor's "open file" policy regarding this case, he had been affirmatively led to believe that the evidence in the case related only to the chickens and dry goods theft, and that because he had had no notice of the beef evidence (and had been affirmatively misled regarding its non-existence) admission of the evidence at trial, after he had committed himself to a theory of the defense without knowledge of the evidence unfairly surprised and prejudiced him in the presentation of his defense, and thus violated the basic due process concept of notice and fairness. If the trial court felt that it would be unfair to the government to deprive it of the use of this newly discovered evidence, he argued, it should at the very least declare a mistrial so that he might rethink the posture of his defense in light of this evidence, and start anew with knowledge of that which he had to meet.

The trial judge ruled, however, that the evidence was admissible as a part of the proof of conspiracy, noting that although

the government "abandoned" any reliance on Rule 404(b), it seemed to him that the evidence would be admissible under that Rule "to show intent, preparation, plan, knowledge, identity." Because of the government's "abandonment," however, he eschewed reliance on that Rule.

As soon as the trial judge announced this ruling, Petitioner formally moved for the declaration of a mistrial on the basis that, however unintentional the prosecutor's actions may have been, he was "effectively sandbagged" by his justified reliance on the prosecutor's representations regarding the state of his evidence. The other defendants on trial specifically joined in the motion. The trial judge, however, denied the motion on the basis that he found no "manifest necessity" for the grant of a mistrial, and the trial continued.

The Government's evidence centered upon the activity of one John Ranzoni, a roofing contractor and sometime criminal entrepeneur who had formerly been a defendant in the case, had pled guilty, but who did not testify at trial. Ranzoni, who had met the defendant Atisha when he was hired to repair the roof at the Petitioner's supermarket, was partners in the roofing business with one Dwight Benning, a principal witness for the government. Benning testified that in 1981 he introduced Ranzoni to Wayne Smith, another government witness, as well as the defendant Michael Covington, and that shortly thereafter, he assisted the defendant Covington in moving the stolen truckload of chickens, as well as its driver, who had been shot in the course of the hijacking. With the assistance of Wayne Smith, Benning testified, the truck was moved to a surburban Detroit location, where it was left.

According to Benning, John Ranzoni then directed him and Smith to rent a refrigerated trailer to go and transship the chickens in, but when they arrived at the location where the hijacked truck had been left, they found that it was gone — as it turned out it had been discovered and removed by the

authorities. The refrigerated trailer had been leased, the evidence showed, in the name of Hometown Foods, a business operated by the Petitioner and his brother, but the representative of the leasing company who testified at trial could not say whether it was the Petitioner or his brother who had opened the account or arranged for the particular lease.

The government also offered the testimony of Wayne Smith, who essentially corroborated that of Benning as to the truckload of chickens. Additionally, both he and Benning were permitted to testify that they assisted in the delivery of a truck load of sides of beef to the Hometown market as well as other locations, and while Smith was unable to state who was present at the time of the unloading of the meat, Benning testified that the unloading was done by himself, Smith, Ranzoni and the Petitioner.

The government also offered testimony of the drivers of both the chicken and beef trucks, and, admittedly, the circumstances of the hijacking and abduction of the drivers were shown to be similar — while waiting to unload their cargo at an early hour of the morning, the drivers were approached by black males, appearing to be employees of the consignee of the load, who then produced weapons (a gun in the case of the chickens, and a knife in the case of the beef) and drove off in the truck, abandoning the driver at some other location and continuing on with the stolen goods. However, while the driver of the chicken truck was shot by one of the thieves (said by the government to be an unapprehended defendant known only as "Butch"), the driver of the beef truck was unharmed. It is undisputed that both truck loads were sufficiently shown to have been moving in interstate commerce and to have a value in excess of $100.00.

With respect to the load of dry goods, the theft and distribution of which was alleged in the indictment to have been an object of the conspiracy, and the possession of which formed the

basis of the substantive charge against the Petitioner, the government offered no direct evidence regarding its theft, but the fact that the merchandise in question (some of which was ultimately recovered from the defendant Kyriazakos) was indeed stolen from interstate commerce, and had a value in excess of $100.00 is not in dispute.

As to the dry goods, the evidence showed that the defendant Fulwylie, who testified as a witness, met with John Ranzoni in Detroit in early May, 1982 and arranged to sell the truckload to John Ranzoni for $12,000.00; the goods were then in the possession of another individual, who did not testify. Ranzoni arrived with his then *aide-de-camp*, Donald Covington Sr., and met the defendant Atisha, who inspected the dry goods, but did not participate in the discussions between Ranzoni and Fulwylie. After he had inspected the merchandise, the Petitioner left (as he had come) in his own vehicle, and Ranzoni, Covington, Fulwylie and the driver of the truck containing the dry goods went at Ranzoni's instructions to a business known as Universal Refrigeration (owned and operated by the defendant Kyriazakos), where the contents of the truck were unloaded and stored. Over the course of the next few days, the merchandise was inventoried by Ranzoni, his wife, Covington and his son, with Kyriazakos and Atisha present from time to time. At the conclusion of the inventory process, Petitioner removed the bulk of the merchandise, although some of it was distributed to the persons working in the inventory, as well as to the defendant Kyriazakos (who later turned his share over to the FBI).

Petitioner testified in his own defense. A naturalized citizen who immigrated from Iraq when he was ten and a half, he owned his first business, a small convenience store, at the age of 17. Since then, he has become the owner, either alone or in various partnerships with members of his family, of a supermarket (Hometown Foods), a hardware store, several convenience and liquor stores, a wholesale egg company, and a

number of commercial rental properties throughout the Detroit area. Additionally, he testified, he became involved over the years in the buying and selling of what is known as salvage merchandise.

Petitioner testified that merchandise can become available on the "salvage" or "distressed" market in a number of different ways: it may be damaged or defective in some way, may constitute a part of over-production, may have been misshipped or the product of a bankruptcy or close-out sale of some sort. In the salvage market, he testified, it is common to deal not only with full time brokers, but with persons who deal in this sort of merchandise only as a side line and whose principal occupation is something else. It is in this context that he acknowledged having purchased the Zayre dry goods from (or through) John Ranzoni.

He testified that he met Ranzoni in early 1981, when Ranzoni was hired by his brother to repair the roof at the Hometown Foods. Because the roof work seemed at first to be acceptable, he and his brother hired Ranzoni (and his partner Benning) to do additional roofs on other business properties which they own. He testified that while Ranzoni was doing this work, he asked Petitioner (whose credit he thought was better than his own) to open an account at a truck leasing company so that he could rent a truck to haul roofing materials. Petitioner testified that he did open the account and authorized Ranzoni to use it, but denied that he knew that any truck was ever rented for any criminal purpose, and denied any knowledge of the stolen chickens. His testimony was that he ultimately paid the leasing company's bill because he felt that it was his obligation to do so (even though he had not authorized the particular rental), and because he did not wish to jeopardize his own credit reputation over a $200.00 bill.

While Ranzoni was doing the roofing work, Petitioner also sold him, on credit, a car which he had purchased at a bankruptcy auction.

Petitioner testified that in the spring of 1981 his relationship with Ranzoni began to deteriorate. With the coming of the spring rains, the roofs that Ranzoni had worked on began to leak. Ranzoni failed to pay him for the car that he had bought. The unpaid truck leasing bill came to his attention. And when he attempted throughout that summer and into the fall to get satisfaction from Ranzoni regarding these various problems, all he got were excuses.

Finally, in the spring of 1982, Ranzoni contacted the defendant Atisha and, according to the defendant's testimony, told him that he was going to be able to acquire or acquire the right to dispose of some merchandise from a bankruptcy sale. Still believing Ranzoni to be a legitimate (if somewhat less than reliable) businessman, and hoping for a chance to resolve his financial problems with Ranzoni, Petitioner testified that he agreed to meet Ranzoni and inspect the merchandise in question.

He testified that he did, at Ranzoni's invitation, look at the merchandise, and while he noted the Zayre stickers on it, he was unfamiliar with the Zayre Co. and, because it is not unusual to find distressed or salvaged merchandise which has price tags or stickers on it, did not suspect that the merchandise was stolen. He tentatively agreed to buy the merchandise, once it had been inventoried, and if a price could be agreed on, and after it was inventoried did indeed agree to buy it from (or through) Ranzoni for $18,000.00. Although he estimated the wholesale value of the merchandise to be approximately $30,000, he testified that paying $.60 on the dollar is not unusual in the salvage market, especially where one must either take or leave an entire load, and cannot pick and choose among the merchandise. After agreeing on a price, and resolving the various counter claims he had against Ranzoni, he paid Ranzoni $8,000.00 in cash (the mode of payment Ranzoni said he needed because Ranzoni said he did not wish to put the money through his roofing business), which he obtained by cashing a check out of his own account in that amount.

The merchandise, he testified, was sold in his hardware store and supermarket. His testimony was to the effect that he had no suspicion that the goods were stolen until the FBI began to investigate.

Petitioner testified that he had no knowledge regarding the load of beef until the testimony came out during the trial. His brother, he testified, was principally responsible for the running of the meat department at their store, and Petitioner would not, in the ordinary course of things, have been involved or have knowledge of the purchase of meat. After hearing the testimony at trial, he began to suspect that his brother may have bought the beef, but after conferring with counsel, he decided that he did not want to be in a position where he could or would know or say anything that might hurt his brother, so he did not make any attempt, after hearing the testimony, to determine whether or how his brother may have bought the meat.

After six days of testimony, the jury began its deliberations. On the second day of deliberations, they asked for certain testimony to be read back, stating they were "confused and deadlocked." The trial judge suggested that they attempt to resolve questions regarding testimony through discussion, leaving the possibility of rereading the testimony open, and over objection, also gave the jury a modified *Allen* charge. After a second request, the testimony (from the driver of the hijacked chicken truck) was reread to them. On the day following, the court answered another question as to when a defendant must have knowledge of the stolen character of goods, in order to "knowingly" possess them, and after 4 days of deliberation, the jury found Petitioner guilty of both conspiracy and substantive charges, but was unable to agree as to the other defendants.

On June 14, 1986, Petitioner was sentenced to five years in the custody of the Attorney General, and to pay committed fines totalling $10,000.00. He appealed his conviction of right

to the Sixth Circuit Court of Appeals which, on October 30, 1986 filed its Opinion (Appendix A *Infra*) affirming the decision of the trial court.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

A federal prosecutor may, if he chooses to, play the matter of discovery of his theory and evidence close to the chest. Rule 16, Federal Rules of Criminal Procedure, and the Jencks Act, 18 USC §3500, impose only limited disclosure obligations, and permit a prosecutor to foreclose any pre-trial access to witness statements or similar material. And the law is clear that, other than the "plain, concise and definite written statement of the essential facts constituting the offense charged" required by Rule 7(c)(1), Federal Rules of Criminal Procedure, not require the government to disclose to the defendant prior to trial its theory of the case or the nature of its evidence. *See, e.g., United States* v *Gabriel*, 715 F2d 1447 (10th Cir. 1983)

On the other hand, a "trial by ambush" is antithetical to the sense of fairness which underlies our system of criminal justice. *United States* v *Kelley*, 420 F2d 26, 29 (2nd Cir. 1969) And, of course, the development of the law has been marked by "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice." *Dennis* v *United States*, 384 US 855, 870 (1966), *see, also, Wardius* v *Oregon*, 416 US 470, 473-474 (1973). Thus, considerations of grand jury secrecy aside, a federal prosecutor clearly has discretion to make full pre-trial disclosure of the factual material upon which his case is based.

The case at bar presents an unfortunate instance in which a laudible policy of voluntary pre-trial disclosure went awry to

the manifest prejudice of the defendant, placing him in exactly the kind of predicament which such policies are designed to eliminate — actually, in a situation even worse, as will be seen.

A. The Indictment:

In the first instance, the government had limited separate prosecutions with respect to the theft and receiving of the poultry stolen in April of 1981, and the dry goods stolen in May of 1982. Petitioner was charged only in the dry good case, and there only with receiving the goods — there was no conspiracy count in that indictment, which was returned in January of 1984. It was only some 10 months later, in October of 1984, when the original incarnation of the indictment upon which he ultimately stood trial was returned.

That indictment, which was superseded on two occasions, but was not altered in any material way as to its scope, alleged a conspiracy between the several defendants extending from January 1981 to on or about May 1, 1982. The object of the conspiracy was alleged generally to be to steal and receive and possess goods which had been a part of interstate commerce. John Ranzoni was the focus of the conspiracy allegations; it was alleged in the indictment that he "would use his contacts through a roofing business which he conducted to arrange" the thefts, and the "fencing" of the stolen goods.

The "overt acts" allegations of the conspiracy count did set forth a series of conversations between Ranzoni and the defendant Covington regarding thefts in general, and of meat thefts in particular from the packing company where Covington was said to be employed. (As trial testimony makes clear, the defendant Covington was employed at Orleans International, the consignee of the chicken load — the load of beef which was referred to at trial was consigned to a company known as Michigan Veal, with which defendant Covington was not said

to have had any association, and was in no way adverted to by the allegations of the indictment.) Beyond these general allegations, however, the only events to which any allegations of the indictment aluded were those surrounding the April, 1981 load of poultry and the May, 1982 load of dry goods. As the Assistant United States Attorney who was responsible for the investigation and prosecution of the case throughout its various stages acknowledged, the Grand Jury heard no testimony whatsoever regarding the shipment of beef referred to at trial.

B. Pre-Trial Discovery:

Petitioner was, during the early stages of the proceedings represented by counsel other than the writer. However, in December of 1984, some 6 weeks after the indictment upon which he was tried was returned, undersigned counsel was retained and substituted his appearance. From the very beginning of the writer's involvement in this case, the Assistant United States Attorney who has throughout supervised the investigation and prosecution, maintained an "open file" policy. Indeed, he went beyond this and, as was stated without contradiction in the trial court, set out precisely what the government's theory was, and what it was anticipated each witness would testify to.

At no time prior to the empanelling of the jury and the making of opening statements did the Assistant advise counsel that there was to be any evidence regarding any thefts whatsoever other than the poultry and dry goods; indeed, as stated without contradiction in the court below, the first notice to counsel came towards the end of the second day of trial.

It is true that counsel filed no motions for bills of particulars or discovery — however, such motions would have been frivolous in light of the government's open-handedness in the pretrial stages of the case, and the long-standing working relationship and trust between defense counsel and the prosecutor.

The record below does, however, suggest that the government did have some information regarding the meat theft and sale sometime before the trial began. Dwight Benning testified that he had told the FBI case agent, Jess Lopez, about the stolen beef sometime during the week before the trial started. Special Agent Lopez, for his part, recalled that on Friday, April 5, 1985 (the trial began on Tuesday, April 9, 1985) Benning told him about his and Wayne Smith's involvement in unloading the beef, and identified the name of the Wisconsin shipper of the beef. Wayne Smith testified that he was asked about the beef by Special Agent Lopez, in the presence of the Assistant United States Attorney, the following Monday — the day before the trial started. This is consistent with the prosecutor's statement to the court when the issue was first raised, on the second day of trial, that "the first confirmation that I had that this thing actually existed and involved some of the same people was two days ago" — apparently meaning the day before the trial. The picture that emerges is that, while the government had some notice of the potential significance of the beef incident several days before the trial, it was not until the eve of trial that documentation regarding the theft was secured, and all of the records, reports and documents were not in the government's hands until the trial actually began.

Thus, before the trial began, the government had some information, which it did not disclose to the defense, that suggested that the defendant Atisha had been involved in the receiving of stolen beef, as well as the poultry and the dry goods which had already been identified. Petitioner assumes that the prosecutor did not act in bad faith in failing to disclose the existence of this information, but rather felt it more prudent to wait until he had documented this information to his

satisfaction before advising counsel that he felt he had evidence which he could present at trial.* Whatever prompted the non-disclosure however, it is undisputed that by the time defendant was apprised of the existence of the evidence relating to the meat, he had already committed himself to a theory of the case by way of his own opening statement.

C. The Duty to Disclose:

While (at least from a defense standpoint) the law imposes only limited requirements of pre-trial disclosure upon the government, it is also clear that the government does have a "duty of candor toward the defendant." *United States* v *Hibler*, 463 F2d 455, 459 (9th Cir. 1972). This "duty of candor" seems clearly to require that, if a federal prosecutor represents to defense counsel that he will make full disclosure, even beyond that which the law requires, no less than full disclosure is required. While petitioner imputes no degree of bad faith to the Assistant United States Attorney, it also seems clear that once the prosecutor was made aware, before the trial began, of the existence of evidence regarding the beef theft, he had a duty to disclose that new evidence to the defendant immediately — or at least before the defendant, relying on his prior representations, had committed himself to a theory of the facts in his opening statement.

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* Whatever the prosecutor's state of mind might have been, it seems clear that by the time he made his opening statement, the possibility that he might want to present evidence regarding the beef theft had apparently occurred to him. While in his opening statement he only specifically referred to facts relating to the poultry and dry goods loads, when he described the "overall plan of what the entire conspiracy was," he stated, in a comment that went overlooked by the writer at the time, (and may indeed have been unintentional) that that plan called for "a load of interstate goods, either meat or chicken or dry goods or whatever," to be stolen, taken to Universal Refrigeration for storage, and distributed to the defendant Atisha and others. (IT, 12–13)

The case law makes clear that a United States Attorney's decision to adopt an "open file" policy carries with it corresponding duties to insure that a defendant's reliance upon that policy is not misplaced. *See, e.g., United States* v *Emery*, 591 F2d 1266, 1268 (9th Cir. 1978); *United States* v *Herring*, 582 F2d 535, 540–541 (10th Cir. 1978). Both common sense and the case law suggest that compliance with a voluntarily assumed obligation to disclose is as critical to the fairness of our adversary system as is compliance with a requirement of disclosure mandated by statute or court rule; that is to say, once the prosecution has assured the defense that it will make certain (or full) disclosure, it is as bound to turn over information encompassed by that assurance as it would have been had the disclosure been required by law. *See, e.g., United States* v *Franklin*, 704 F2d 1183, 1191 (10th Cir. 1983)

Thus, those cases which hold that non-compliance with a discovery requirement renders withheld information inadmissible, *e.g., United States* v *Baillelaux*, 685 F2d 1105, 1115 (9th Cir. 1982); *United States* v *Stull*, 521 F2d 687, 692 (6th Cir. 1975) are applicable to the case at bar, and are persuasive of the proposition that the trial judge erred in admitting the evidence relating to the stolen load of beef. Indeed, there is respectable authority for the proposition that if a defendant is "significantly misled" by the withholding of information which should have been made available under an "open file" or similar policy, sanctions such as the exclusion of that evidence are appropriate. *United States* v *Sukomolachan*, 610 F2d 685, 688 (9th Cir. 1980). This, of course, is because withholding or denial of a defendant's access to evidence or information which should be turned over to him for whatever reason, and which plays a significant part in the case against him undercuts the defendant's right to a fair trial. *United States* v *Baum*, 482 F2d 1325, 1332 (2nd Cir. 1973)

While the testimony (and colloquy) suggests that the Assistant United States Attorney had knowledge of the existence of

evidence regarding the beef theft only the day before the trial, it also suggests that the FBI agent in charge of the case had this information at least three days prior to that. The case law is clear that the government's duty of disclosure, whatever it may be in a particular instance, extends to a person in the position of the case agent so that a failure to disclose information in the possession of the case agent is as much a breach of the government's "duty of candor" as it is if the prosecutor himself possessed the information. *See, e.g., United States* v *Caldwell*, 543 F2d 1333, 1351 (DC Cir. 1974); *Freeman* v *State of Georgia*, 599 F2d 65, 69 (5th Cir. 1979); *United States* v *Bryant*, 439 F2d 642, 650-651 (DC Cir. 1971). Thus, even if one would be inclined to excuse the prosecutor's failure to disclose on the very eve of trial as inadvertant or *de minimis*, the failure to disclose by the prosecution team viewed as a whole cannot be so easily dismissed.

That the information withheld relating to the stolen load of beef, was "significant" to the case, and that the defendant was "significantly misled" by its non-disclosure, cannot be gainsaid.

D. The Prejudice to the Petitioner:

At the time the government made its initial proffer of the evidence regarding the stolen beef, Petitioner had already made his opening statement. In it, he had unalterably committed himself to a theory of the case which was premised upon the representations of the prosecutor regarding the state of the evidence to be presented, and which tacked, anticipated and depended for its credibility upon the testimony which the defendant himself ultimately gave.

Starting with the premise that the only question the jury had to answer was whether the government proved the charges in the indictment beyond a reasonable doubt, counsel first assured the jury that the only two incidents which were involved in the case were the chicken theft and the dry goods

theft. He acknowledged that Atisha's purchase of the dry goods, in the belief that it was legitimate salvage merchandise, and denied any knowledge of the chicken theft; he outlined his theory of the evidence in some detail, offering the same explanation that the Petitioner ultimately gave from the witness stand. In fact, the opening statement committed the Petitioner to testifying, since it was only from him that some of the promised testimony could possibly come — especially that dealing with his motivation and thought processes.

As anyone who had tried or presided over the trial of a significant criminal case must know, the dynamics of a criminal trial are subtle, evanescent and sometimes outcome-determinative. In the case at bar, the government offered the testimony of three witnesses regarding the theft and receipt of stolen beef, when defense counsel had assured the jury that the case was only about poultry and dry goods. The most that Petitioner himself could say about this new development was that he had nothing to say. It is, of course, impossible to determine to what extent the undercutting of defense counsel's credibility by the admission of this unanticipated evidence or of the defendant's by his lame protestations of ignorance of it could have affected the jury's verdict. However, it is clear that the jury considered the question of guilt and innocence a close one — they announced themselves "deadlocked" at one point, and ultimately were unable to arrive at a verdict as to the other two defendants — and it is equally clear that, in this closely contested case, the evidence of the beef theft loomed large.

Yet the unfair prejudice worked upon Petitioner by the unanticipated admission of this evidence was greater and more fundamental than the mere undercutting of credibility. As noted above, the defense had, by its opening statement, effectively committed itself to offering the testimony of the Petitioner — if he did not testify there would have been simply no

evidence to back up the affirmative assertions of defense counsel regarding the relationship between him and Ranzoni, the negotiations for the purchase of the dry goods, and the assertions regarding his belief that he was purchasing salvage merchandise. More significantly, in his opening statement, defense counsel admitted that Atisha had opened the account at the truck leasing company from which Ranzoni rented the truck which was to be used to move the stolen poultry, and admitted as well that the Petitioner had purchased the dry goods which turned out to be stolen.

These admissions, of course, need not have been made. Petitioner could have legitimately attacked the credibility of those witnesses who claimed to have seen him take possession of the dry goods (all of whom were testifying as a result of some sort of agreement with the government), and need not have admitted having opened the truck rental account. These admissions were, of course, made in anticipation of the Petitioner's testimony, and on the basis of the government's representations that the evidence in the case would relate only to the poultry and dry goods thefts. The writer would not presume to represent that had he been advised on the eve of trial of the existence of the evidence relating to the stolen beef, he would have elected not to have the Petitioner testify, but to rely instead upon a "reasonable doubt defense." The point, of course, is that he *might have*. And, of course, he would certainly not have committed himself in his opening statement to factual assertions regarding the state of the evidence which were shown to be false by subsequent testimony.

The unanticipated introduction of evidence regarding the stolen beef also affected the significance of an important aspect of the government's case against Petitioner. As noted above, the witness Wayne Smith testified that he helped unload some of the stolen beef at the defendant's market. Other than this, his testimony did not affect the Petitioner at all. For this reason, as was argued to the trial judge, counsel had not

anticipated cross-examining Smith at all, and had done no investigation or preparation (or even the simplest background check) to determine whether his testimony could be impeached or discredited. Counsel was simply unprepared to make an intelligent decision as to whether (or how to) attempt to undermine his testimony, and the trial court's ruling did not allow him an opportunity to get prepared.

This unpreparedness was not due to neglect, but to a justified reliance on the prosecutor's assurance that full disclosure had been made. Had counsel not been so assured, he might not have assumed that the witness Smith was of no significance to him, and could have at least made some effort to determine what, if anything, could (or should) be done about his testimony. Whether or not he could have effectively impeached that testimony is of course, unknown — but the trial court's ruling deprived him of the opportunity to make an informed decision on the question. And the record does reflect that (discretion being the better part of valor) counsel did not mount any attack upon the witness' testimony (unprepared to do so as he was).

Petitioner does not ask, and the law does not require that this Court speculate on what might have been had the promised full disclosure really been made. The point, rather, is that the undisclosed evidence was "significant," and the Petitioner was "significantly misled" by its non-disclosure, to his detriment.

E. The Mistrial Motions:

Petitioner argued below that, at the very least, the government was "morally estopped" from introducing the evidence relating to the stolen beef, because of its representations regarding the nature of the evidence in the case, and the defendant's justified reliance upon those representations. He argued there, and argues here, that it was simply not fair to

allow the government to introduce evidence which it had assured the defense did not exist, when the defense had relied upon those assurances and committed itself to a trial strategy and theory of the facts. Fairness, of course, is the essence of the due process guarantee. Fairness is also a two way street.

The recently discovered evidence regarding the stolen beef was, as the Assistant United States Attorney aptly acknowledged, "certainly a surprise. . . a pleasant one, coming to me, and an unpleasant one for them." It was important evidence for the government, and clearly helpful to the government's cause on the conspiracy charge. Recognizing that fairness is a reciprocal concept in an adversary system, Petitioner suggested that if the court felt it unfair to deny the government the benefit of this evidence, it should at least grant a mistrial so that he could prepare to meet this evidence, and structure his defense and make his presentation to the jury with the full knowledge of the government's case which the government had promised he would possess. While the request for a mistrial was first made only secondarily to the argument that the evidence should be excluded, after Judge Gilmore ruled that he would admit the evidence, it was formally renewed and joined in by other defendants. The mistrial motion was renewed, and again denied after testimony established that the FBI agent in charge of the case had been told about the stolen beef by the witness Benning the week before the trial began.

In his initial ruling denying the first mistrial motion (adhered to in denying the subsequent motion), the trial judge noted the paucity of case law setting a standard for the decision of such motions, but indicated that he was guided by this Court's decision in *Brock* v *North Carolina*, 344 US 424, 427 (1952), in which the Court held that a trial may be properly discontinued "when particular circumstances manifest the necessity for so doing, and when failure to discontinue would

defeat the ends of justice.'' The standard, he concluded, was whether the failure to grant a mistrial would cause a ''manifest injustice.'' Based on his conclusion that ''this evidence could come in under two theories, as either part of the conspiracy or 404(b),'' Judge Gilmore concluded that there was not ''such substantial prejudice to cause a mistrial,'' and therefore, denied the motion.

In so ruling, Judge Gilmore erred in several regards, and that error demonstrates the need for further precedental guidance from this Court.

First, and most basically, the trial court apparently applied the wrong legal standard in deciding the motion. The standard of ''manifest necessity'' adverted to in *Brock* is one which was derived in response to double jeopardy challenges from defendants whose first trials were terminated either over their objection or without their consent, and who asserted their right to have their guilt or innocence determined by the jury into whose hands he initially entrusted his fate. The standard (interpreted by Judge Gilmore as ''manifest injustice'') was derived as a safeguard against an effort by the defense to bar reprosecution, and efforts by the prosecution to, in effect, have two bites at the apple.

When it is a defendant who moves for a mistrial, of course, different considerations apply, and the ''manifest necessity'' standard which was applied in *Brock* (in which the mistrial was declared over defendant's objection) is simply not appropriate. The ''manifest necessity'' rule is a prophylactic one, and as such is more stringent than is appropriate where the need for such prophylaxis prosecutorial overreaching or the deprivation of a defendant's right to have his guilt or innocence finally determined — are not implicated.

That the ''manifest necessity'' standard is inappropriate where it is the defendant who moves for the declaration of a mistrial on the basis of prosecutorial or judicial error (as opposed to wilfull misconduct) is clear from the case at bar.

Thus, in *United States* v *Dinitz*, 424 US 600 (1976), the Court, explaining that the "manifest necessity" doctrine, designed to protect a defendant's "valued" right to a particular tribunal, simply did not apply where a defendant himself seeks a mistrial. (Unless that motion is prompted by "bad faith conduct by judge or prosecutor"), since in such a setting, "[d]ifferent considerations obtain." 424 US *supra* at 607. That the standard for deciding a defendant's motion for a mistrial in a situation such as that posed by the case at bar, (that is, where the motion is not prompted by wilfull prosecutorial overreaching) is a less stringent one than is than that of the "manifest necessity" doctrine is implicit in the Court's decision in *Dinitz*. In rejecting the Court of Appeals' application of the "manifest necessity" standard in a setting where the defendant had moved for the mistrial, (and no claim of wilfull governmental misconduct was involved) the court noted that the application of the "manifest necessity" standard would result in the improper denial of defense mistrial motions, that under a proper standard, ought to be granted; the error in the Court of Appeals' opinion, this Court wrote, was that it "instructs trial judges to reject the *most meritorious* mistrial motion in the absence of manifest necessity. . ." 424 US *supra* at 610 (emphasis added). If the application of the "manifest necessity" standard to a defendant's motion for a mistrial is improper because it would result in the erroneous denial of "meritorious" mistrial motions, the proper standard for the decision of the defense motions must obviously be a less severe one.

A different and lower threshhold for the declaration of a mistrial is appropriate where the defendant moves for the mistrial on the basis of conduct not alleged to be wilfull overreaching for several simple and obvious reasons. First, when the defendant moves for the mistrial, absent conduct by the court or prosecution designed to provoke him into the motion, or otherwise constituting wilfull overreaching, he waives his

right to the jury which has been empanelled. Therefore, the protection of that right is not one which must be weighed in the balance, and to the extent that the right is a "valued one" in constitutional terms, no counterveiling necessity need be shown in order to justify the declaration of a mistrial.

With the need to protect the defendant's right to a particular tribunal removed from the balance, all that is left in weighing against a mistrial are considerations of judicial economy, and the inconvenience to parties and witnesses of starting anew. As significant as a consideration such as these may be in any particular case, they are certainly less weighty than the need to protect valued constitutional rights which gave rise to the "manifest necessity" standard. And in the case at bar, while the Assistant United States Attorney opposed the motion in part because of the inconvenience in bringing the one witness whose testimony had been heard in full back to Detroit from Tennessee the fact remains that only two days of trial time would have been lost by the declaration of a mistrial, and it was only this one witness (who also had testified regarding the events in another unrelated civil proceeding, brought by himself) who had been significantly inconvenienced. The balance of interest or equities represented in the case at bar is quite different from that which is implicated when a defendant is forced to give up his right to trial by a particular jury. Petitioner would submit that since the interests involved are different a different test to weigh the conflicting interests is necessary. He would also, of course, submit that, given the nature of the interests implicated in the mistrial motion the need for fairness to a defendant, who had been significantly misled by the government, far outweighed the interests on the other side of the scale, and if a proper standard to balance these interests (as opposed to interests which were not actually involved in the mistrial question), the propriety of the granting of a mistrial is immediately apparent.

The Court of Appeals recognized the existence of more than one standard for mistrial motions, but held that, even though the trial court had articulated a different standard, it had "arguably" applied the *Dinitz* test, and held in any event that the denial of the mistrial motion was within the ambit of the trial judge's discretion. The rulings of both the trial judge and the Court of Appeals demonstrate unfortunate degrees of confusion regarding the proper standard to be applied when a defendant moves for mistrial in circumstances such as those of the case at bar. This Court should grant Certiorari to clarify the proper standard, and to insure that not only in this case but in later cases, substantial justice will be done.

That non-compliance with discovery obligations, even good faith non-compliance, may constitute an appropriate grounds for the declaration of a mistrial is not open to serious question. *See, e.g., United States* v *Leonard*, 593 F2d 951, 955 (10th Cir. 1979) Considerations of fairness and prejudice would seem particularly apt in such a context, and considerations of "necessity" particularly grudging. And a clearer case of unfairness and prejudice to a defendant cannot be imagined than that presented by the case at bar. The indicia of prejudice are discussed above, and the degree of unfairness in requiring the defendant to continue to verdict after establishing and announcing his defensive posture based upon a fundamental misunderstanding about the state of the government's case brought on by his justified reliance on the government's inaccurate assurances regarding its case, seems self-evident.

That, however unintentional, the government's conduct turned the case at bar into a "trial by ambush" could not be clearer. That the "ambush" may have been unintentional does not make the consequences any less painful to the defendant.

In denying the motion for a mis-trial, the trial judge gave short shrift to the unfairness that resided in the fact that defendant was indisputably surprised by the mid-trial revelation of

this new evidence. He focused instead on his perception that the evidence would have been properly admissible, and in so doing misperceived the thrust of the motion. Indeed, the motion *assumed* the admissibility of the evidence, since it was premised on the previous decision to allow the evidence to be introduced. The question posed by the mistrial motion was whether it was fair to the defendant to require him to complete the trial already started when he had begun it on a false notion of what the evidence would be, a notion which was engendered by the affirmative assurances of the government.

"Open file" and similar policies are laudible because they eliminate the unfairness that resides in a defendant being forced to guess as to what the evidence against him may be. Voluntary disclosure by the prosecution eliminates the dilemma faced by a defendant who, not knowing what the government's case consists of, cannot commit himself to a meaningful defensive posture. A defendant who is uninformed about the nature of the government's case, must of necessity, keep his options open, and maintain a fluid defensive posture. He cannot, and will not, commit himself to a hard and fast theory of the facts from the beginning of a trial, because he does not know what facts may develop and cannot allow himself to be seen by the jury as embracing a factual posture which will be shown by the evidence to be false or incomplete. By the same token, in his preparation for trial, he must prepare to meet as many possible permutations of the evidence as he can imagine — since he does not know what the testimony will be, he must prepare himself to meet any testimony which may conceivably come.

Where, either through an "open file" or other disclosures, a defendant is assured that the case the government will present is thus and so, a defendant will commit himself, both by preparation and trial strategy, to a defensive posture that is aimed at meeting that set of facts and no other. When the government's assurance that he knows all there is to know about

the case is proven false, after he has committed himself to a particular defensive strategy or view of the facts by preparation and representations to the jury, (relying as he inevitably must upon the government's representations), he is in a much worse position than he would have been had the government never made the voluntary disclosures of its evidence in the first instance. He is not only less prepared to meet the unanticipated evidence than he would have been had he not known what to anticipate, since he would have kept all of his options open, and he has, before the jury, committed himself to a theory of the facts and an approach to the defense based upon a seriously inaccurate view of the nature of the case against him, a view which he would never have assumed had the government not assured him that it was accurate.

That the unanticipated evidence might have otherwise been admissible is no answer to the argument that once the defendant began the trial and committed himself to a particular defensive posture based upon the assumption that the evidence did not exist. It is simply unfair to require him to continue that trial, unalterably committed to a defensive posture premised upon an assumption which has now been proven false. In such a context, the question of the admissibility of the evidence under the Rules of Evidence is wholly beside the point. The defendant is prejudiced not by the admission of incompetent evidence, but by the fact that he has taken a position based upon the justifiable assumption that the evidence does not exist. If it is unfair to penalize the government by excluding otherwise admissible evidence, it is equally unfair to penalize the defendant for his justified reliance upon the government's representation, and required him, once he has assumed a particular defensive posture, to remain wedded to that posture while permitting the government to change the factual basis upon which the defendant initially assumed his position, and have the benefit of evidence which it assured the defendant did

not exist. By focusing on the question of admissibility of the evidence, and largely ignoring the practical consequences of the surprise in its admission, the trial judge erred in denying the motions for mistrial.

Indeed, his assumptions regarding the admissibility were also flawed. That evidence should not have been held admissible in the context of this particular trial is argued above. However, reliance on his assumption that the evidence "could come in under two theories, as either part of the conspiracy or 404(b)" was also erroneous, and apparently contributed to the error in denying the mistrial.

For one thing, it seems clear that if the theft and possession of the stolen beef was an act in furtherance of the conspiracy, it could not be at the same time "an other act" under Rule 404(b), Federal Rules of Evidence; the two seem mutually exclusive. Further, the trial court's assumption that the evidence would be admissible under Rule 404(b) flies directly in the face of the prosecution's assurance that the evidence was not offered as an act outside the conspiracy. Moreover, while the trial judge assumed that the evidence would be admissible under Rule 404(b), he at no point was called to upon to make, or did make, the balancing test required by that rule, involving considerations of the necessity of the admission of the evidence and whether the probative value of it is outweighed by the potential for unfair prejudice. *See, e.g., United States* v *Reed*, 647 F2d 678, 687 (6th Cir. 1981); *United States* v *Turquitt*, 557 F2d 464, 468-469 (5th Cir. 1977).

More significantly, whether the evidence is considered to be a part of the conspiracy or an "other act," the Petitioner was equally prejudiced by its unanticipated introduction, since no matter what the evidence is called, he was assured that it did not exist, and prepared to defend and began his defense upon that premise. It is true that the government has no more obligation to disclose "other act" evidence than to disclose

any other part of its case the defendant is assured, as he was in this case, that there was no evidence other than that which revealed to him, he is caught off guard and unfairly prejudiced by the admission of unanticipated evidence no matter whether it is denominated "other acts" or anything else.

F. Amendment and Variance:

As noted above, the Grand Jury which returned the indictment in the case at bar heard no evidence regarding the stolen beef. Petitioner argued below that, for this reason, admission of the evidence at trial would constitute either a constructive amendment of or prejudicial variance from the Grand Jury's indictment. The trial court turned this argument aside, on the theory that the "language of the conspiracy" charge was broad enough to encompass the proferred evidence, and the Court of Appeals endorsed that theory. But that ruling misapprehends the nature of the law of variance and amendment.

As the Sixth Circuit wrote in *Watson* v *Jago*, 558 F2d 330, 333 (6th Cir. 1977):

> Under the Fifth Amendment's provision that no person shall be held to answer for capital crime unless on the indictment of a grand jury, it has been the rule that after an indictment has been returned its charges may not be broadened except by the grand jury itself.

The rule, simply stated, is that the charges in an indictment may not be amended, either through their literal change or "constructively," through "events at trial." *Watson* v *Jago*, 558 F2d *supra* at 334.

The case most often thought of as defining the federal law regarding "constructive amendment" is *Stirone* v *United States*, 361 US 212 (1960). In *Stirone*, the defendant was charged with Hobbs Act extortion, in connection with his dealings with one Rider, who was supplying ready mixed concrete from his plant in Pennsylvania to be used for the erection of a steel processing

plant in Pennsylvania. The indictment charged that through extortionate means Stirone affected commerce "between various points in the United States and the site of [Rider's] plant for the manufacture or mixing of ready mixed concrete, and more particularly, from outside the State of Pennsylvania into the state of Pennsylvania." The trial judge, however, charged the jury that Stirone could be convicted of the charges if the jury found a serious impact on commerce either in connection with the shipments of sand to Rider's plant or the anticipated shipments of steel from the plant which was being erected to points outside the state of Pennsylvania.

The Court held that even if either sort of impact on commerce would be sufficient to sustain a Hobbs Act charge, the fact that the indictment was only charged on the former theory precluded conviction on the latter:

> Thus, the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the derfendant to prosecution for interference with interstate commerce which the grand jury did not charge. . . it follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened. 361 US *supra* at 218.

In *Watson* v *Jago*, *supra*, the court characterized the test to be applied under *Stirone* as follows:

> Under *Stirone*, the question to be asked in identifying a constructive amendment is whether there has been a modification at trial in the elements of the crime charged. Such a modification would result in a constructive amendment. [Citations omitted] 558 F2d *supra* at 334.

Similarly, in *United States* v *Erickson*, 601 F2d 296, 303 (7th Cir. 1979) a prosecution for causing false entries to be made in

bank records, the court ruled that "the prosecution was limited to the theory of falsity alleged in the indictment."

Amendment, unlike the close related concept of variance, is a matter of the nature of the charge laid, not the facts proved. As the court wrote in *Gaither* v *United States*, 413 F2d 1061, 1071 (DC Cir. 1969):

> An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

The rule against constructive amendment is a product of the Fifth Amendment's guarantee of prosecution by a grand jury. However, as the court recognized in *Watson*, the protection of the due process clause provides similar protection, on a somewhat different rationale. As this Court noted in *Cole* v *Arkansas*, 333 US 196, 201 (1948):

> No principle of procedural due process is more clearly established than that of notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Whether viewed as "variance" or "constructive amendment" the addition of the new factual material at the trial of the instant case not only expanded the scope of the charge made by the grand jury, (since the grand jury had no knowledge of that material at all), but also drastically changed the nature of the factual charges against which the defendant was required to defend — and, most significantly, worked those changes in direct contradiction to the government's expressed theory of its case.

CONCLUSION

The decision below gave insufficient currency to the Petitioner's rights to a fair trial, and bespeak a need for guidance regarding the proper standard to be applied in reviewing mistrial motions by defendants in criminal cases. This Court should grant Certiorari, reverse the Court of Appeals decision and order a new trial for Petitioner.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 85-1537, 85-1775

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NAJIB MANSOUR ATISHA (85-1537),
MICHAEL COVINGTON (85-1775),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 30, 1986

Before: LIVELY, Chief Judge; MERRITT, Circuit Judge; and CONTIE, Senior Circuit Judge.

CONTIE, Senior Circuit Judge. Michael Covington and Najib Mansour Atisha appeal from their convictions for conspiring to steal goods from interstate commerce in violation of 18 U.S.C. § 371.[1] Atisha also appeals from his conviction

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[1]Section 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . .

for possessing goods stolen from interstate commerce in violation of 18 U.S.C. § 659.[2]

I.

The indictment charged that, between January 1981 and March 1982, defendants Covington and Atisha, and others, were involved in a conspiracy to hijack tractor-trailers filled with goods, to store the goods for a short period of time and then to convert the goods to their own use. The key actor in the conspiracy was a man named John Ranzoni. The indictment alleged in part:

> It was part of said unlawful conspiracy that JOHN RANZONI, would use his contacts through a roofing business which he conducted to arrange said thefts from interstate shipments.
>
> It was further part of said unlawful conspiracy that JOHN RANZONI would use employees of his business to conduct said thefts; and that other contacts which he had made during the course of said roofing

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[2]Section 659 provides in relevant part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any . . . motortruck, or other vehicle, . . . with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or
>
> *Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen*;
>
> . . .
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. . . .

(Emphasis added).

> business would be contacted to receive and/or "fence" said stolen goods and chattels.

The only overt acts in furtherance of the conspiracy enumerated in the indictment were the hijackings of one truckload of chickens and one truckload of dry goods. It further was alleged that defendant Covington was involved in the actual truck hijackings, whereas defendant Atisha had agreed to purchase a portion of the stolen goods. Although indictments were issued in November of 1982 and January of 1984, these were dismissed by the government. The final indictment was issued on October 30, 1984, with a superseding indictment being issued on March 28, 1985 to correct technical errors.

The jury trial began on April 8, 1985 for defendants Covington and Atisha, and another coconspirator, Dimitrius Kyriazakos. At trial, the government produced evidence of a third hijacking of a truckload of beef whose contents were unloaded at Atisha's place of business. Atisha was convicted on both the conspiracy count and the possession of stolen goods count.[3] He was sentenced on June 14, 1985 to five-years confinement on each count, the prison terms to run concurrently, and was fined a total of $10,000. The jury was not able to reach a jury verdict with respect to Kyriazakos or defendant Covington. Covington was retried before a jury on June 3, 1985, convicted of conspiracy in violation of 18 U.S.C. § 371 and he was sentenced to five-years confinement on September 6, 1985.[4]

On appeal, Atisha asserts that he was denied a fair trial when testimony relating to the beef hijacking scam was admitted into evidence. Specifically, Atisha asserts that the government violated its "open file" policy and that the new evidence constituted a constructive amendment to, or preju-

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[3] The possession of stolen goods count was solely related to the truckload of dry goods and not the truckloads of chicken or beef.

[4] Kyriazakos was not retried, having decided to enter a plea of guilty.

dicial variance of, the indictment. Under either theory, Atisha argues that the district court abused its discretion in denying his motion for a mistrial due to the severe prejudice he experienced. Defendant Covington asserts on appeal that the lengthy pre-indictment delay violated his Fifth Amendment right to due process and that the post-arrest delay violated his Sixth Amendment right to a speedy trial. Covington also asserts that he was denied a fair trial when the trial court limited his cross-examination of the government's key witness. For the reasons which follow, we affirm each conviction.

II.

By maintaining an "open file" policy, the United States Attorney permitted the defendants' counsel full access to the evidence which the government intended to put forth as well as the theories upon which it intended to rely. On the second day of Atisha's trial, however, the United States Attorney, for the first time, expressed his intention to elicit testimony relating to the hijacking of a truckload of beef, an offense which was not specifically enumerated in the indictment as being one of the overt acts in furtherance of the conspiracy. The government's attorney announced that he had just recently learned of this theft, its relevance to the conspiracy charge and the willingness of both Dwight Benning and Wayne Smith to testify about this theft.[5] Each defendants' counsel objected to the admission of this evidence and moved for a mistrial.[6] Although Atisha argued that having relied on the government's open file policy he was prejudiced by the introduction of the new evidence, and that the admission of the evidence constituted a variance of or a constructive

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[5] Dwight Benning was a coconspirator who later agreed to testify for the government and was the first individual to inform the government of this particular theft. Wayne Smith was also a government witness and coconspirator.

[6] Defendant Covington does not raise this as an issue, however, having received a second trial.

amendment to the indictment, the district court disagreed, ruling that the evidence was admissible to prove a conspiracy, or as "other acts" evidence under Fed. R. Evid. 404(b),[7] and reasoned that a mistrial was not warranted.

A. "Open File"

While Fed. R. Crim. P. 16 places some requirements on the government to disclose evidence to a defendant,[8] the government is not compelled by statute or the Constitution to disclose evidentiary details or " 'to explain the legal theories upon which it intends to rely at trial.' " *United States v. Gabriel,* 715 F.2d 1447, 1449 (10th Cir. 1983) (quoting *United States v. Burgin,* 621 F.2d 1352, 1359 (5th Cir.), *cert. denied,* 449 U.S. 1015 (1980)). *See also Weatherford v. Bursey,* 429 U.S. 545, 559 (1977) ("[t]here is no general constitutional right to discovery in a criminal case"). If the government agrees to maintain an "open file" policy, thereby disclosing its evidence and theories to the defendant, however, the government is obligated to adhere to that agreement. *See United States v. Herring,* 582 F.2d 535, 540-41 (10th Cir. 1978); *United States v. Millet,* 559 F.2d 253, 256-57 (5th Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978). A defendant is justified in relying upon the government's representations of maintaining open records; breaking an open file agreement by withholding important evidence or a key theory can obviously cause great prejudice to a defendant.

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[7] Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[8] Primarily, Rule 16 provides that the government must, upon request of the defendant, disclose statements of the defendant, the defendant's prior record, certain documents, tangible objects, reports of examinations and tests.

However, the mere fact that a defendant is not made aware of certain evidence until shortly before or at trial does not mandate a finding that the government has violated its open file policy. Rather, if the government had not secreted the evidence, and had made the evidence available to the defendant within a reasonable time after the government learned of the evidence's significance or reliability, there has not been a violation of an open file policy. *See, e.g., United States v. Franklin,* 704 F.2d 1183, 1191 (10th Cir.) (evidence was not secreted and its relevance was not readily apparent), *cert. denied,* 464 U.S. 845 (1983); *Herring,* 582 F.2d at 541 (no abuse to admit evidence which was not secreted and was made available to the defendant before the trial began). *Cf. United States v. Kelly,* 420 F.2d 26 (2d Cir. 1969) (where prosecution failed to disclose evidence pursuant to a discovery order).[9]

An open file agreement is essentially an informal discovery agreement; as with other discovery orders, it is generally within the district court's discretion to award sanctions when there has been a violation. *See Franklin,* 704 F.2d at 1191. Therefore, even if the government violated its open file policy, it would still be within the district court's discretion to determine what the appropriate sanction—such as excluding

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[9] In support of his argument that the government should not be allowed to rely on this newly discovered evidence, and that admission of the evidence constitutes an "ambush," the defendant relies on a number of suppression of evidence cases. These are totally irrelevant for analyzing the case at bar because the suppression of evidence cases deal with suppressing exculpatory evidence. *See, e.g., United States v. Sukumolachan,* 610 F.2d 685 (9th Cir. 1980) (per curiam); *Freeman v. Georgia,* 599 F.2d 65, 69 (5th Cir. 1979), *cert. denied,* 444 U.S. 1013 (1980); *United States v. Hibler,* 463 F.2d 455, 459 (9th Cir. 1972); *United States v. Bryant,* 439 F.2d 642 (D.C. Cir. 1971). In the instant case, there are no allegations of actual suppression or secreting the evidence, nor is this evidence exculpatory. Similarly, this is not a case where the prosecution *prevents* a defendant from discovering evidence. *See United States v. Baum,* 482 F.2d 1325 (2d Cir. 1973).

the evidence or awarding a continuance or mistrial—should be.

In the case at bar, the jury trial began on a Tuesday; the previous Friday, witness Benning had a conversation with Special Agent Lopez about the hijacking of a truckload of beef. The United States Attorney was not immediately notified of this new information and the first partial verification of Benning's statement was not received until Monday, the day before trial, when coconspirator Wayne Smith was interviewed by Lopez and the United States Attorney. Atisha argues that, although the evidence was not intentionally withheld, the government was obligated to inform him of this evidence on Friday, or at least before his counsel delivered an opening statement on the first day of trial.

The United States Attorney asserted that, although Benning had informed the government of a beef theft, the government did not have enough information to know whether the evidence would be used at trial until the trial was under way. At trial, the United States Attorney stated to the district court:

> Mr. Benning did advise us the weekend before that he was aware of what basically he testified to. He did not know the name of the company. We had no details. We had no way to verify what company that came from. We couldn't verify the theft. It was not until the following week .... We did not know the name of the company involved with the meat until after we had begun this trial.

There is no assertion, or indication, that the government secreted this evidence, and we do not believe that an open file policy obligates the government to instantaneously inform a defendant of each new piece of information regardless of its significance or foundation. In the instant case, it was established that the beef incident was still under investigation when the trial began and that the government had yet

to decide whether it could use the evidence; once it was decided that the evidence could be used, the government informed the defendants of its existence. We do not find the delay to have been unreasonable under the circumstances and do not believe that there was an open file violation.

The defendant nonetheless asserts that he was severely prejudiced by justifiably relying on the government's representations regarding its evidence and theory of the case; that defense counsel committed himself to a theory of defense and a strategy which he might not have chosen had he been informed about the beef incident. Specifically, defense counsel committed himself to placing the defendant on the stand and represented to the jury that only two thefts were involved. Atisha argues that the government's conduct was tantamount to "sandbagging" and that a new trial was essential in order to provide him an opportunity to restructure his defense.[10]

Defense counsel's opening statement indeed indicates that Atisha's defense primarily focused on rebutting the government's case regarding the stolen chickens and dry goods. Defense counsel asserted that the evidence would establish that Atisha was never involved in the stolen chicken incident and that Atisha believed the dry goods were merely salvage merchandise. On more than one occasion, defense counsel also reminded the jury of its duty to determine whether the government has proven the specific charges in the indictment beyond a reasonable doubt. Although defense counsel arguably committed himself during opening argument to proceed in a particular matter, we do not believe that the district court was required to exclude the evidence or grant a mistrial.

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[10] Atisha's counsel also argued that Atisha was prejudiced because the defense was not prepared to cross-examine Smith since Smith had never before implicated Atisha. However, the record reflects that defense counsel had adequate time to prepare for Smith's appearance on the stand, and that there was no renewal of Atisha's request for a continuance.

First, the mere fact that the defendant was surprised by the evidence does not mandate that the evidence be excluded. *See Herring*, 582 F.2d at 541; *United States v. Wixom*, 529 F.2d 217, 220 (8th Cir. 1976) (per curiam). Second, there is no rule that evidence must be excluded or a mistrial granted on the basis that a defendant had committed himself to a theory which was undermined by new evidence. *See United States v. Bavers*, 787 F.2d 1022, 1028 (6th Cir. 1985). There is *always* a possibility that new evidence will be discovered, even if the defense was structured around assurances made by the government. This may be particularly so when the indictment charges a conspiracy.

The defendant argues, however, that the district court used the incorrect legal standard in reviewing his motion for a mistrial. The district court, relying on *Brock v. North Carolina*, 344 U.S. 424, 427 (1953), reasoned that a mistrial motion must be granted only upon a showing of "manifest necessity"; absent a showing of serious prejudice, or a denial of due process, however, the district court stated that there was no requirement to grant a mistrial. The defendant argues that the court should not have used the "manifest necessity" test; rather, since the defendant was requesting the mistrial, as opposed to the government, a less strict standard should apply. Since the court did not use a lesser standard, the defendant asserts that the district court's exercise of discretion cannot be trusted. We are not persuaded by the defendant's argument in this regard and find that the district court's articulation and application of the test was not in error.

The defendant is correct in noting that more than one test for reviewing the granting of mistrials has been articulated by the Supreme Court, depending on whether the government or the defendant makes the motion. *Compare Brock*, 344 U.S. at 427 ("'a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice' ") (quoting *Wade v. Hunter*, 336 U.S. 684, 690 (1949)), *with United*

States v. Dinitz, 424 U.S. 600, 609-10 (1976) (if defendant has "'no choice' but to request a mistrial," and if there is a "legitimate claim of seriously prejudicial error," a mistrial can be granted upon the defendant's motion even in the absence of a "manifest necessity").

However, both *Brock* and *Dinitz* are double jeopardy cases where the issue presented was whether the retrial of a defendant placed him in double jeopardy. Under *Brock*, double jeopardy attaches if the court sua sponte, or pursuant to the government's motion, grants a mistrial and there was no manifest necessity for doing so; under such circumstances, the defendant cannot be retried. In contrast, if the defendant requests a mistrial, the general rule is that "any barrier to a retrial" is removed, *United States v. Thomas*, 728 F.2d 313, 318 (6th Cir. 1984); there need not be a "manifest necessity" for a trial court to permissibly grant a defendant's motion for a mistrial, and double jeopardy will not attach. *Dinitz*, 424 U.S. at 610.

In the instant case, we are not reviewing a trial court's grant of a mistrial as in *Dinitz* or *Brock*; rather, we are reviewing a denial of a mistrial motion and must determine under what circumstances a mistrial *must* be granted, not simply when a mistrial may permissibly be granted. Since granting a mistrial is generally within a trial court's discretion, *see Brock*, 344 U.S. at 427, we must decide when a trial court has abused its discretion by failing to grant a mistrial. *See United States v. Faulkenbery*, 472 F.2d 879, 882 (9th Cir.) (appeals court may reverse a denial of a mistrial motion only upon a showing of abuse of discretion), *cert. denied*, 411 U.S. 970 (1973).

We initially note that the district court arguably applied the *Dinitz* standard by inquiring into whether the defendant would suffer any serious prejudice were the trial to continue, and we agree with the district court that the allegation of prejudice in this case does not rise to the level of serious prejudice.[11] Further, the district court inquired into whether

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[11] In *Dinitz*, the defendant had been faced with judicial or prosecutorial misconduct, and the Supreme Court spoke in terms of seriously

the defendant would be denied due process were the trial not aborted. We believe that a determination of the fairness to the accused is the primary concern in ruling upon a mistrial motion; if, by admitting this evidence, the trial was not rendered unfair, we do not believe the district court can be said to have abused its discretion by denying defendant's motion for a mistrial. *See, e.g., United States v. Nace,* 561 F.2d 763, 768-69 (9th Cir. 1977) (admitting the evidence did not render the trial unfair). Our review of defense counsel's opening statement, as well as the record in this case, convinces us that the trial was not rendered unfair by the admission of this new evidence. Therefore, we hold that the district court did not abuse its discretion by denying defendant's motion for a mistrial on the theory that the government violated its open file policy which consequently resulted in severe prejudice to the defendant.

B. Amendment or Variance

It is clear that "after an indictment has been returned its charges may not be broadened except by the grand jury itself." *Watson v. Jago,* 558 F.2d 330, 333 (6th Cir. 1977). *See also Stirone v. United States,* 361 U.S. 212, 216 (1960). In the instant case, defendant Atisha notes that the grand jury never reviewed evidence relating to the stolen beef and that the admission of this evidence therefore constituted an impermissible constructive amendment to or prejudicial variance of the indictment. *See United States v. Jones,* 647 F.2d 696, 700 (6th Cir.) ("material alteration of the theory of criminal liability" by the court constituted an impermissi-

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prejudicial *error,* rather than simply serious prejudice. We do not believe that the prosecutor's conduct or the court's admission of this evidence can be classified as seriously prejudicial error; therefore, regardless of whether the test is serious prejudice or seriously prejudicial error, the defendant's allegations do not warrant a finding that a mistrial should have been granted.

ble amendment to the indictment), *cert. denied*, 454 U.S. 898 (1981).

> "An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment."

Watson v. Jago, 558 F.2d at 334 (quoting *Gaither v. United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969)) (emphasis in the original).[12]

To determine whether there has been a constructive amendment, the court must decide "whether there has been a modification at trial *in the elements of the crime charged*." *Id.* at 334 (explaining *Stirone v. United States*) (emphasis added).

We agree with the district court that introducing the evidence of the stolen beef did not constitute a constructive amendment to, or variance of, the indictment. The indictment alleged a conspiracy which clearly encompassed the theft of this truckload of beef; the time-frame, modus operandi, and characters were identical to those alleged in the indictment. In support, we note that "there is no requirement in conspiracy cases that the government disclose even all the overt acts in furtherance of the conspiracy." *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979). Further, by admitting evidence of another overt act, the theory of the case was not changed, the defendant was not charged with a different substantive crime, and

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[12] Although variances of and amendments to an indictment are both prohibited, only amendments are considered per se prejudicial, whereas variances are subject to the harmless error rule. *Watson v. Jago*, 558 F.2d at 334.

the elements of the crime charged were not altered. We therefore conclude that the district court did not err in refusing to grant a mistrial or to exclude the evidence on this basis.

III.

Defendant Covington argues that his convictions cannot stand because the pre-indictment delay was so unreasonable that he was denied due process under the Fifth Amendment, and that the post-arrest delay violated his right to a speedy trial under the Sixth Amendment.

A. Pre-indictment Delay

Although the crimes for which Covington was convicted occurred between January 1981 and May 1982, the indictment which he was charged under was not issued until October 30, 1984.[13] Two earlier indictments had been issued in November 1982 and January 1984, but were subsequently dismissed pursuant to the government's request. The government claims that the January 1984 indictment was dismissed when coconspirator Benning decided to cooperate with the prosecution, providing the government with an opportunity to investigate the criminal conspiracy in more detail. Covington does not challenge this assertion; rather, he argues that the government arrested him on bogus charges of non-payment of child support in 1982 when the government's intent was actually to investigate his involvement in this conspiracy. Although he provides no evidence to substantiate this claim, Covington asserts that the government was obligated to inform him of its investigation and to indict him at an earlier date.

The concern over a lengthy delay in filing charges against a defendant is often focused on the staleness of those charges;

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[13] A superseding indictment was issued on March 28, 1985 to cure minor technical deficiencies.

for that reason, the acceptability of a pre-indictment delay is generally measured by the applicable statute of limitations. *See United States v. Ewell*, 383 U.S. 116, 122 (1966). However, the Fifth Amendment also imposes due process restraints on the length of a pre-indictment delay. A showing of prejudice to the defendant, without more, is not enough to prove a due process violation; rather, there must also be a consideration of the reasons for the delay. *United States v. Lovasco*, 431 U.S. 783, 791 (1983). A pre-indictment delay which is instigated by the government so as "'to gain tactical advantage over the accused' " may violate a defendant's due process rights, *id.* at 795 (quoting *United States v. Marion*, 404 U.S. 307, 324 (1971)), whereas a delay resulting from investigative efforts "does not deprive [a defendant] of due process, even if his defense may have been somewhat prejudiced by the lapse of time." *Id.* at 796. *See also United States v. Napue*, 401 F.2d 107, 115 (7th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

The defendant asserts that he was prejudiced by the delay because the government's key witness had a faulty memory which resulted from the delay. Covington asserts that this prevented him from reconstructing the events of the days in question.[14] Although such allegations, if true, may satisfy the prejudice prong of the Fifth Amendment test, *see United States v. Feinberg*, 383 F.2d 60, 65 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968), Covington does not come forth with any evidence to rebut the government's claims that this delay was necessitated by investigative efforts. Even were the defendant's allegations of the 1982 bogus charges true, that fact would not necessarily mandate a conclusion that the delay was instituted by the government merely to gain a tactical advantage over him. We find, therefore, that the pre-indictment delay, although lengthy, did not violate the defendant's Fifth Amendment right to due process.

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[14] Covington does not allege that there was insufficient evidence to convict him, however.

B. Post-arrest Delay

> The Sixth Amendment speedy trial guarantee
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> is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.

United States v. Ewell, 383 U.S. 116, 120 (1966). This guarantee is not implicated when charges are formally dropped against the defendant. *United States v. Marion*, 404 U.S. 307, 313 (1971). Therefore, we reject Covington's assertion that the delay should be measured from the day he was arrested in 1982 since formal charges were not pending against him as of that date. Rather, we will judge the constitutionality of the delay only between the date Covington was re-indicted, October 30, 1984, and the date he was first brought to trial, April 8, 1985.

Although the Speedy Trial Clause does not provide guidance for determining when a defendant has been denied his right under the clause, the Supreme Court adopted a balancing test in *Barker v. Wingo*, 407 U.S. 514, 530 (1972):

> We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

See also United States v. Gibson, 513 F.2d 978, 980 (6th Cir. 1975) (per curiam); *United States v. Borman*, 437 F.2d 44, 46 (2d Cir.) (per curiam), *cert. denied*, 402 U.S. 913 (1971).

The defendant asserts that he was prejudiced by the failing memories of the prosecution's witnesses. The Court acknowl-

edged in *Barker v. Wingo* that the impairment of a defendant's ability to prepare a defense is the most serious prejudice which can result from post-arrest delay. 407 U.S. at 532. However, there is absolutely no indication that the prejudice resulted from the post-arrest delay; only six months elapsed from the day Covington was indicted to the date he was tried. Further, there is nothing to indicate that the government lacked justifiable reasons for the delay. We conclude, therefore, that defendant Covington was not denied his Sixth Amendment right to a speedy trial.

IV.

During the course of defendant Covington's second trial, the district court limited defense counsel's cross-examination of government witness Benning. The defendant argues that this limitation prevented him from discrediting the government's key witness and deprived him of the right to a fair trial. The defendant goes so far as to suggest that if his right to cross-examine Benning had not been limited, he would not have been convicted. We find that this argument lacks merit.

While a defendant has a Sixth Amendment right to confront and cross-examine witnesses, it is not an absolute right; the "trial court may, in its discretion, limit its scope." *Stevens v. Bordenkircher*, 746 F.2d 342, 346 (6th Cir. 1984). In some instances, it may be an abuse of discretion to limit cross-examination regarding "a witness' bias, prejudice, or motive for testifying, . . . or curtail cross-examination concerning whether testimony is given with the expectation of immunity or out of fear or coercion . . . ." *Id.*[15]

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[15] We note that defendant's reliance on *Loraine v. United States*, 396 F.2d 335 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968), is misplaced. *Loraine* involved a prosecution's suppression of evidence, whereas this case concerns a trial court's exercise of discretion in limiting cross-examination. The mere fact that evidence was not adduced at trial does not indicate that it was "suppressed" by the prosecution.

We find no support in the record for Covington's assertion that the testimony which would have been adduced at trial was relevant to the issues of bias, prejudice or motive for testifying. Benning was questioned on both direct and cross-examination regarding the agreement he had with the government in exchange for his testifying; the trial court did not limit this line of questioning. Rather, the court only limited Covington's questioning of Benning concerning the nature of Benning's probation sentence for breaking and entering, a misdemeanor offense, as well as police investigations of Benning which never resulted in a conviction.[16] The prosecutor specifically objected to the evidence relating to police investigations on the grounds of relevance. At no time did Covington argue to the trial court that this evidence was relevant to the issue of bias, prejudice or motive; nor did he assert that further charges were dropped against Benning as the result of a separate agreement with the government. We do not detect any error in the court's limitation of Covington's right to cross-examine Benning; further, given the abundance of evidence against him, we find no basis for defendant Covington's assertion that his conviction hinged on this cross-examination of Benning.

Accordingly, the defendants' convictions are AFFIRMED.

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[16] From our reading of the transcript, we are not persuaded that the testimony Covington wished to elicit was admissible under Fed. R. Evid. 609(a) which permits the use of prior convictions as impeachment evidence if:

> [T]he crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involves dishonesty or false statement, regardless of the punishment.

Benning was convicted of entering property without permission, a misdemeanor offense which does not involve dishonesty or a false statement. The other investigations did not even result in convictions.